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NO. 815

IN THE

Supreme Court of the United States

October Term, 1963

STRACHAN SHIPPING COMPANY, *Petitioner*

-versus-

KONINKLYKE NEDERLANDSCHE STOOMBOOT MAALSCHAPPY, N. V., *Respondent*

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Chief Justice and Associate Justices of The Supreme Court of The United States:

Petitioner Strachan Shipping Company respectfully petitions this Honorable Court for a rehearing of its order entered herein on March 23, 1964, denying the petition for writ of certiorari, and again prays that writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, as prayed for in the petition filed herein February 7, 1964, and would respectfully show that substantial grounds therefor exist, although not previously presented, as follows:

Grounds For Allowing Rehearing And Grant of Certiorari

There is no basis in the decisions of this Honorable Court or of any court of the several states for the holding that a litigant must pay the attorneys' fees and expenses of litigation of his adversary, and the settled American rule, uniformly applied by the appellate courts of every state in which the matter has been litigated, is that such expenses are not recoverable unless provided for in advance by agreement or statute.

There is no valid reason for departing from established principles of law in longshoremen's cases. The courts below in this case have fashioned a new rule for such cases which will spread confusion into other areas of the law as well as in admiralty, as the dissenting opinion of Mr. Justice Black emphasizes in the case of *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company, Inc.*, ___ U.S. ___ 84 S.Ct. 748, decided March 9, 1964, and the writ should be granted to correct such fundamental error.

STATEMENT

A longshoreman employed by petitioner, a stevedoring company, brought this action against the respondent shipowner to recover damages for injuries allegedly received as a result of respondent's negligence and the unseaworthiness of its vessel. Petitioner was brought into the suit as a third-party defendant by respondent, which claimed it was entitled to indemnity against any liability to the longshoreman because petitioner allegedly breached its implied warranty to perform its stevedoring services in a good and workmanlike manner.

There was no written indemnity agreement between respondent and petitioner.

Judgment was entered upon a jury verdict that the longshoreman take nothing from the respondent. Despite the fact that the respondent incurred no liability to the longshoreman, the trial court entered judgment on the third-party action that respondent recover its costs, attorneys' fees and expenses from petitioner because the jury found in answer to one question that the accident happened through the petitioner's failure to use the ship's loading facilities properly. The Court of Appeals affirmed.

ARGUMENT

There is not a single decision by an appellate court of any state that petitioner has found which departs from the long-settled American rule of law that a litigant cannot recover from his adversary his own attorneys' fees and litigation expenses, other than ordinary court costs, in the absence of a specific contract or a statute granting such recovery except in certain rare cases where the defendant has acted willfully or maliciously and he is penalized by being required to pay the wronged person's expenses.[1]

This settled American rule of law is uniformly observed; regardless of whether the action is *ex contractu* or *ex delicto*,[2] at law or in equity.[3] The cases hold that attorneys' fees are not recoverable as an item of damages unless

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[1] Appendix, where cases from 41 jurisdictions are listed.

[2] **Baldus v. Mattern**, S.Ct. N.D. 1958, 93 N.W.2d 144, 149; **Hiss v. Friedberg**, S.C.A. Va. 1960, 112 S.E.2d 871, 875.

[3] **Ritter v. Ritter**, S.Ct. Ill. 1943, 381 Ill. 549, 46 N.E.2d 41, 43; **Miura v. Nishimoto**, S.Ct. Haw. 1940, 35 Haw. 595, 606.

provided for by contract or allowed by a specific statute,[4] and allowance as a part of damages without statutory or contractual liability therefor has been held to be contrary to public policy.[5]

Even in jurisdictions where the plaintiff's litigation expenses are imposed by statute as a penalty upon the defendant who has acted in bad faith, the plaintiff cannot recover his attorneys' fees as part of the compensatory damages unless he is entitled to recover other compensatory damages besides those fees. *Shemwell v. Graham*, 5 Cir. 1948, 166 F.2d 391, *Smith v. A. A. Wood & Son Company*, Ct. of App. Ga. 1961, 120 S.E.2d 800, 805. This is the common law rule also in cases where there is no statute but where because of malice or fraud punitive damages are recoverable. *United Power Co. v. Metheny*, S. Ct. Ohio, 1909, 90 N.E. 154, 156.

It has been held that even where there is a statute which allows a recovery of attorney fees that such a statute is penal in character and is to be strictly construed, *Van Zandt v. Ft. Worth Press*, S. Ct. Tex. 1962, 359 S.W. 2d 893, 895, reh. denied. In at least one jurisdiction the allowance of counsel fees in favor of a successful litigant was

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[4] **Olmstead v. Rosedale Building & Supply, Inc.**, S.Ct. Ark. 1958, 313 S.W.2d 235, 239; **State v. Bloomfield Const. Co.**, S.C.E. Conn 1840, 11 A.2d 382, 386; **Lyon v. Whitsell**, C.A. Ky. 1951, 245 S.W.2d 926; **Dworsky v. Vermes Credit Jewelry**, S.Ct. Minn. 1955, 69 N.W. 2d 118, 124; **City of Laurel v. Bush**, S.Ct. Miss. 1960, 120 So.2d 149, 155; **Edwards v. Smith**, S.Ct. Mo. 1959, 322 S.W.2d 770, 777; **Miss Susan, Inc. v. Enterprise and Century Undergarment Co., Inc.**, S.Ct. N.Y. 1946, 62 N.Y.S.2d 250, 253, aff'd N.Y.C.A. 1947, 74 N.E.2d 461; **Loeb v Loeb**, S.Ct. Vt. 1958, 144 A.2d 825, 830.

[5] **Thayer v. Wright Company**, C.A. Tenn. 1961, 262 S.W.2d 805, 812, cert. den. by Tenn. S.Ct. 1962

abolished by statute. *Crutchfield v. Foster*, S. Ct. N.C. 1938, 200 S.E. 395, 396.

Here, where petitioner never by contract agreed to bear the respondent's attorneys' fees and legal expenses, no statute allows recovery of such expenses, and respondent incurred no liability and no damages by reason of the longshoreman's suit, the only effect of allowing such recovery is to punish a stevedore who has the courage to defend against what he feels to be an unjust claim.

Moreover, the holdings of the courts below are not only thus contrary to rules of American law heretofore well settled but are glaringly contrary to the express provisions of the Longshoremen's and Harbor Workers' Compensation Act, Mar. 4, 1927, c. 509, § 5, 44 Stat. 1426 (33 U.S.C. 901, et seq.), Section 5 of which in explicit language provides that the liability of an employer under the Act "shall be exclusive . . . of all other liabilities . . . to the employee . . . *and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury . . .*" (emphasis ours). (Here of course petitioner was insured pursuant to the terms of that Act. R. 21.)

By holding that the shipowner is entitled to recover its attorneys' fees and expenses of litigation from the stevedore even though it suffered *no* damages and incurred *no* liability, the courts below have completed the full circle in defiance of this statutory language which provides explicitly that the insured stevedore shall have *no* liability other than for compensation, to *absolute* liability even for the shipowner's expenses of litigation in defending a groundless claim. From being an insured the stevedore has become an insurer.

The decisions below, we respectfully submit, in practical effect impose an indefensible burden upon American stevedores which inures primarily to the benefit of foreign shipowners (who have by far the greatest number of vessels in American ports), contrary to statute and American rules of law. As Mr. Justice Black stated in dissenting from the recent decision of this Court in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company, Inc.*, ____ U.S.____, 84 S. Ct. 748, decided March 9, 1964, it is also an unwarranted expansion of the general principles of warranty which will undoubtedly cause confusion in other areas of the law as well as in admiralty.

CONCLUSION

Petitioner respectfully submits that the holdings of the courts below are clearly erroneous and contrary to long-established principles of law which have been uniformly applied in all American jurisdictions and contrary to the express terms of the Longshoremen's and Harbor Workers' Compensation Act, and that the petition for writ of certiorari should in justice therefore be granted to assure conformity in longshoremen's cases with the law as to attorneys' fees which prevails in all other cases, at law, in equity and in admiralty.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE (Rule 58)

I certify that the within petition for rehearing of the order of the Honorable the Supreme Court of the United States denying the petition for writ of certiorari to issue to the Honorable the Court of Appeals for the Fifth Circuit entered March 23, 1964, is presented in good faith and not for delay and is restricted to the grounds set forth in Rule 58 of the Supreme Court Rules, namely intervening circumstances of substantial effect or other substantial grounds available to petitioner and not previously presented.

ROBERT EIKEL
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that service of the within petition was made upon Messrs. Eastham, Watson, Dale & Forney, 1201 Mellie Esperson Building, Houston, Texas, attorneys for respondent, by mailing copy thereof to them this ____ day of April, A. D. 1964.

ROBERT EIKEL

APPENDIX

ALABAMA: *Taylor v. White*, S.Ct. Ala. 1939, 188 So. 232, 233

ARIZONA: *United States Fidelity & Guaranty Co. v. Frohmiller*, S.Ct. Ariz. 1951, 227 P.2d 1007, 1008

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GEORGIA: *Smith v. A. A. Wood & Son Company*, C.A. Ga. 1961, 120 S.E.2d 800, 805

HAWAII: *Miura v. Nishimoto*, S.Ct. Haw. 1940, 35 Haw. 595, 606

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MARYLAND: *Freedman v. Seidler*, C.A. Md. 1963, 233 Md. 39, 194 A.2d 778, 782

MASSACHUSETTS: *Dahlstrom Metallic Door Co. v. Evatt Const. Co.*, S.Ct. Mass. 1926, 152 N.E. 715, 720

MINNESOTA: *Dworsky v. Vermes Credit Jewelry*, S.Ct Minn. 1955, 69 N.W.2d 118, 124

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NEW JERSEY: *Textileather Corporation v. American Mut. Liability Ins. Co.*, 1933, 166 A. 214, 216

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NORTH CAROLINA: *In re Howell's Will*, S.Ct. N.C. 1933, 168 S.E. 671

NORTH DAKOTA: *Baldus v. Mattern*, S.Ct. N.D. 1958, 93 N.W.2d 144, 149

OHIO: *United Power Co. v. Metheny*, S.Ct. Ohio, 1909, 90 N.E. 154, 156

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OREGON: *Kern v. Gentner*, S.Ct. Ore. 1945, 159 P. 2d 190, 193

PENNSYLVANIA: *Becker v. Borough of Schuylkill Haven*, Superior Ct. Pa. 1963, 200 Pa. Sup. 305, 189 A. 2d 764, 767

SOUTH CAROLINA: *United States Rubber Company v. White Tire Company, Inc.*, S.Ct. S.C. 1956, 97 S.E.2d 403, 409

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VERMONT: *Loeb v. Loeb*, S.Ct. Vt. 1958, 144 A. 2d 825, 830

VIRGINIA: *Hiss v. Friedberg*, S.C.A. Va. 1960, 112 S.E. 2d 871, 875

WASHINGTON: *State v. City of Bremerton*, S.Ct. Wash. 1941, 111 P. 2d 612, 616

WYOMING: *Yellowstone Sheep Co. v. Ellis* S.Ct. Wyo. 1939, 96 P. 2d 895, 906

DISTRICT OF COLUMBIA: *Murphy v. O'Donnell*, Mun. Ct. of Appeals D.C. 1948, 63 A. 2d 340, 342